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729-073—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 868

GERALD TAYLOR AND CLIFTON A. HAMMOND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 8–13) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1964. On February 10, 1964, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including February 25, 1964. The petition was filed on February 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a motion to return evidence was properly construed by the district court and the court of appeals as alleging a proprietary interest in numbers slips and gambling equipment.

STATEMENT

In the United States District Court for the District of Maryland, the two petitioners and two others were tried before the court under an information charging them in four counts with (1) violating 26 U.S.C. 7262 by operating a lottery without having paid the occupational tax imposed by 26 U.S.C. 4411; (2) violating 26 U.S.C. 7203 by wilfully failing to pay the occupational tax; (3) violating 26 U.S.C. 7272 by failing to register as required by 26 U.S.C. 4412(a); and (4) violating 26 U.S.C. 7203 by wilfully failing to supply information required by 26 U.S.C. 4412(c) (D.A. 1–3A).[1] The petitioners were convicted on all counts. Each was sentenced to concurrent terms of three months' imprisonment on the second and fourth counts, fined $1000 on the first count, and fined $50 on the third count. Payment of all but $500 of the fines was suspended (D.A. 34A). Codefendant John W. Butler was also convicted on all counts, and the remaining codefendant, Evelyn Freeman, was acquitted (D.A. 34–35A, Tr. 232).

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[1] "R." refers to the certified record, "D.A." to petitioners' appendix in the court of appeals, "G.A." to the government's appendix in the court of appeals, "Tr." to the transcript of the trial which we have lodged with the Clerk of the Court, and "E. Tr." to the transcript of the hearing of the motion to return evidence which we have also lodged with the Clerk.

The pertinent facts may be summarized as follows:

1. In July 1959 special agents of the Internal Revenue Service observed a house in Anne Arundel County, Maryland, for seven days. On each day petitioner Hammond, at times varying between 3:51 and 4:25 p.m., arrived at the house in an automobile with either Evelyn Freeman or an unidentified male (D.A. 11–18A, G.A. 6–10 app., Tr. 37–51). Hammond and his passenger would then enter the house carrying, on most occasions, a large brown paper bag. Immediately afterwards, an air-conditioning unit, located at a corner of the house where the window shades were drawn, would begin to operate. Shortly after petitioner Hammond's arrival, never more than forty minutes later, John W. Butler and petitioner Taylor would arrive in a second automobile and would enter with a second brown paper bag (D.A. 11–18A, G.A. 6–10 app., Tr. 37–51). The agents were unable to ascertain how long the four defendants remained in the house each day (the agents were hiding in a thicket infested with mosquitoes from a nearby swamp). However, one evening between 8:30 and 9:00 p.m. an agent drove by the house and observed that the two cars which had been there that afternoon were gone (Tr. 42–43, 137–138).

On the seventh day the agents returned with a search warrant (Tr. 50). About one hour after observing the four defendants enter the house, the agents and marshals knocked at the door and announced their presence (D.A. 18–19A, Tr. 196–197). After receiving no response, they broke into the house

and entered the room with the drawn window shades (D.A. 20–21A, Tr. 196–197). There they found petitioner Taylor and codefendant Butler standing behind a table, taking money out of envelopes on the table, and putting the money into their pockets (D.A. 21A). Petitioner Hammond and codefendant Freeman were also in the room (D.A. 20). The room contained four adding machines, number slips, and other gambling equipment (D.A. 21–31A). Petitioners' counsel conceded at the trial that the house "obviously [was] a counting house or a collecting station" (Tr. 212).[2] The agents searched each defendant and seized $86.16 from petitioner Hammond and $1008.88 from petitioner Taylor (D.A. 30A). Included in the money seized from Taylor was $822.88 found loose in his trouser pockets (G.A. 26 app.). The two petitioners, as well as defendant Butler, admitted to the agents

[2] The inner workings of a numbers operation was the subject of expert testimony at the trial. Bets are usually placed with "writers" who act as agents for those persons, called "bankers" or "backers", who run the operation. In the afternoon the money and numbers slips are collected from all the writers by "runners" or "pickup" men and taken to the headquarters of the operation, sometimes called a "bank" or "counting house". At the headquarters are clerical personnel who tabulate the winnings and losses for the day and make returns to the writers. On many occasions, the banker is also at the headquarters, and sometimes the banker meets the runners at an appointed place and he, himself, takes the money and slips to the headquarters (Tr. 64–91).

The federal wagering tax laws apply to bankers, writers, and other persons with a proprietary interest in the operation, but not to persons who are merely runners or clerical employees. *United States* v. *Calamaro*, 354 U.S. 351; *Ingram* v. *United States*, 360 U.S. 672.

that they were familiar with the provisions of the federal wagering tax laws (Tr. 151–152). None of the defendants had paid the occupational tax or complied with the registration and information requirements (Tr. 30–32).

2. On December 21, 1959, petitioners jointly filed a pre-trial motion in which they asked the court "to suppress the evidence herein seized, and return their property" (D.A. 4–5A). On March 28, 1960, this court decided *Jones* v. *United States,* 362 U.S. 257, holding that it was unnecessary for an accused to allege a proprietary interest in order to have standing to suppress evidence. The motion was heard on April 11, 1960, and later denied (E. Tr. 1–74).

3. At the trial, the court received into evidence petitioners' earlier motion to suppress and to return (Tr. 18–26). The trial court found that petitioner Taylor was more than a clerical employee and that he had a proprietary interest in the numbers operation, since in the motion to return evidence he had alleged ownership of money and gambling equipment which the evidence showed to belong to the enterprise (Tr. 232–233, 246–252, 255–256). As for petitioner Hammond, the trial court found that he had alleged a proprietary interest in the gambling equipment and that he was also guilty of aiding and abetting petitioner Taylor (Tr. 233–236, 246–252, 255–256). *Jones* v. *United States supra,* the trial court held, had no application to a motion which asks that evidence be returned (Tr. 246–252). The court of appeals affirmed the convictions, holding that both petitioners had

alleged a proprietary interest in the gambling equipment and that the *Jones* case was unapplicable (Pet. App. 8–13).

ARGUMENT

The only question presented by the petition (Pet. 2) is whether the district court and the court of appeals erred in construing the motion to return evidence as alleging a proprietary interest in the numbers slips and other gambling equipment seized by the agents during the raid (Pet. 2, 5–6). An examination of the motion shows that the introductory paragraph asked the district court "to suppress the evidence herein seized, and return *their* property" (emphasis supplied); that the first paragraph alleged petitioners were "occupants" of the premises and described the numbers slips and gambling equipment; and that the second and third paragraphs described the money and other articles seized from each petitioner's person (D.A. 4–5A). Thus the construction urged by petitioners—that the motion asserted only an interest in the personal articles, and not the numbers slips and gambling equipment—is untenable; for, as the trial judge observed, the language of the second and third paragraphs cannot be distinguished from the language of the first, and therefore the claim of ownership appearing in the introductory paragraph must be taken as referring to the numbers slips and gambling articles as well as to the money and personal property (Pet. 5, Tr. 246–248).

Moreover, it is clear from the extended remarks of the district judge at the trial that, in any event, peti-

tioners' guilt was based principally on petitioner Taylor's allegation of an interest in the money seized from his person, including the $822.88 found loose in his trouser pockets—money which, the trial judge found, had been taken from the envelopes on the table and had been the proceeds of the numbers operation (Tr. 232–233, 251–253, 255–256). Petitioner Taylor's claim to that money, together with the agent's observations of his activities both before and during the raid, showed that he had a proprietary interest[3] in the enterprise (Tr. 241, 252–253). As for petitioner Hammond, the trial judge indicated that he would be an aider and abetter if petitioner Taylor were found to have a proprietary interest (Tr. 233, 235–236). The evidence showed that he knew of the federal wagering tax laws and that he participated in concealing the numbers operation from law enforcement officers, which, under the decisions of this Court, is sufficient to convict him of aiding and abetting. *Ingram* v. *United States*,[4] 360 U.S. 672, 678–680; cf. *Bozza* v. *United States*, 330 U.S. 160, 164–165.

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[3] See note 2, *supra*.

[4] In *Ingram* v. *United States*, this Court said that a clerical employee of a gambling operation could be convicted of conspiring to violate the federal wagering tax laws if it were shown that he knew of these laws and that he participated in concealing the operation. 360 U.S. at 678–680. The same principle would apply to aiding and abetting. See generally, *Pinkerton* v. *United States*, 328 U.S. 640; *Model Penal Code*, Sec. 2.04(3), comment (Tent. Draft No. 1, 1953).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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